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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 404

MELROSE DISTILLERS, INC., CVA CORPORATION
AND DANT DISTILLERY AND DISTRIBUTING
CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT S. MARX,
ROY G. HOLMES,
900 Tri-State Building,
Cincinnati 2, Ohio,
HILARY W. GANS,
1904 First National Bank
Building,
Baltimore 2, Maryland,
Counsel for Petitioners.

Of Counsel:

NICHOLS, WOOD, MARX & GINTER,
900 Tri-State Building,
Cincinnati 2, Ohio,

MARKELL, VEAZEY & GANS,
1904 First National Bank Building,
Baltimore 2, Maryland.

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IN THE
Supreme Court of the United States

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No. _____

MELROSE DISTILLERS, INC., CVA CORPORATION
AND DANT DISTILLERY AND DISTRIBUTING
CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on August 29, 1958 affirming a judgment of the United States District Court for the District of Maryland.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported as yet and is printed, together with the judgment of the Court, as Appendix A. hereto.

The opinion of the District Court is reported in 138 F. Supp. 685 (D. C. Md. 1956) and is printed on pages 43-82 of the record as printed for use of the Court of Appeals¹ (nine copies of which record are filed herewith).

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1958. The jurisdiction of this Court is invoked under Sec. 1254(1), Title 28 U. S. C. A. (App. B.).

QUESTIONS PRESENTED

On April 6, 1955, the petitioners, who were, respectively, two Maryland corporations and a Delaware corporation, and subsidiaries of Schenley Industries, Inc., a Delaware corporation, were indicted in three counts, along with their corporate parent and some fifty-one other defendants, for alleged violations of Sections 1 and 2 of the Sherman Act (Sections 1 and 2, Title 15 U. S. C. A.) with respect to alcoholic beverages shipped into Maryland (R. 1-14).

On May 2, 1955, each of said petitioners was duly dissolved under the laws of the State of its creation for commercial and legal reasons having nothing to do with the indictment (R. 21, 25, 32). On June 27, 1955, motions to dismiss as to these three petitioners (because of their dissolutions) were filed on their behalf (R. 16, 27, 23) which were later carried forward into other motions (filed Nov. 30, 1955) to dismiss the indictment on the ground (among others not here pertinent) that it stated no offense in view of the laws of Maryland regulating alcoholic beverages in that State under the Twenty-First Amendment (R. 40-43).

On January 10, 1956 the District Court denied the motions and some two years later on January 6, 1958 adjudged

¹ Reference thereto will be indicated thus: (R. . . .).

the petitioners (among others) guilty upon pleas of "nolo contendere" and sentenced them to fines aggregating \$18,500 (R. 89-92). The Court of Appeals affirmed (App. A.). The questions raised by the motions (which the Court of Appeals held to have survived the pleas nolo) and presented by this petition are:

1. Can a Maryland corporation or a Delaware corporation be further criminally prosecuted (in a federal court for a federal offense) following its dissolution under the laws of the state of its creation occurring after indictment but before arraignment or plea, such dissolution timely appearing of record in the case?
2. Did the indictment in this case state an indictable offense in view of the comprehensive laws of Maryland regulating the sale, traffic and control of alcoholic beverages in that state?

CONSTITUTION AND STATUTES INVOLVED

The pertinent portions of Section 278 Delaware General Corporation Law; Sections 72(b) (now 76(b)), 74 (now 78) and 78(a) (now 82(a)), Article 23, Ann. Code of Maryland 1951; Sections 1, 105 (now 109), 105(e) (now 109(e)), Article 2B, Ann. Code of Maryland 1951; Section 1254(1) Title 28 U. S. C. A.; Sections 1 and 2 of the Sherman Act (Sections 1 and 2 Title 15 U. S. C. A.) and Section 2 of the Twenty-first Amendment to the Constitution of the United States, are set forth in the Appendix B. hereto.

STATEMENT

An indictment (R. 1-14) covering the period from January 1950 to the date of its return was returned in the District Court on April 6, 1955 against 24 corporate, and 31 individual defendants. The 24 corporate defendants included 14 "defendant manufacturers" among which were

the three petitioners herein as well as their parent corporation, Schenley Industries, Inc., a Delaware corporation, of which they were wholly owned subsidiaries.

Among the 31 individual defendants was an officer of each of the petitioners described as having been actively engaged in its management, direction or operation and as having authorized, ordered or done some or all of the things complained of (R. 3, 5-6).

The petitioners, Melrose Distillers, Inc. and CVA Corporation, were Maryland corporations while petitioner, Dant Distillery and Distributing Corporation, was a Delaware corporation.

The indictment charged violation of Sections 1 and 2 of the Sherman Act (Sections 1 and 2 Title 15, U. S. C. A.) in three counts as follows:

First: That the defendants knowingly combined and conspired to raise, fix, maintain and stabilize wholesale and retail prices of alcoholic beverages (shipped into Maryland) in violation of Sec. 1 of the Sherman Act; in this count certain conduct is alleged from which the charge is inferred (R. 10-11, 14-15).

Second: That the defendants knowingly combined and conspired to monopolize trade and commerce in such alcoholic beverages, in violation of Sec. 2 of the Sherman Act, and the same conduct is alleged (by reference) as supporting that charge (R. 13).

Third: That the defendants attempted to monopolize interstate trade and commerce in such alcoholic beverages in violation of Sec. 2 of the Sherman Act and again the same conduct is alleged (by reference) as supporting that charge (R. 13-14). In other words, the conduct alleged in the First Count does triple duty. It may be appropriate

here to note that the government admitted that it had no direct evidence of a conspiracy but implied a conspiracy from the conduct alleged (R. 14-15).

It is specifically alleged in the indictment (Par. 17 of the First Count, par. 3 of the Second Count and par. 4 of the Third Count (R. 12, 13-14)) that it was not the purpose, intent or effect of the offenses charged therein to promote the purpose of the Fair Trade laws of the United States or the State of Maryland. It is noteworthy that a like allegation is not made with respect to the Alcoholic Beverages Law of Maryland (R. 12).

On May 2, 1955 (some 26 days after the indictment was returned) each of the three petitioners was duly dissolved under the laws of the state of its creation (R. 17, 24, 28) for commercial and legal reasons independent of the indictment (R. 22, 26, 34).

On June 27, 1955 motions to dismiss the indictment as to petitioners in view of their dissolutions, were filed by their last directors. These motions were later imported and adopted into other motions to dismiss (filed Nov. 30, 1955) on the ground (among others not here pertinent) that the indictment did not state an offense in view of the Maryland laws regulating sale, traffic and control of alcoholic beverages in that state under the Twenty-first Amendment (R. 16, 27, 23 and 40-43). On June 28, 1955 the petitioners were arraigned and pleas of "not guilty" were entered for each.

On January 10, 1956 the District Court denied all motions to dismiss. Those portions of its opinion pertinent to the two questions here presented are conveniently sub-headed as "V. Motion to Dismiss as Against Dissolved Corporations" (138 F. Supp. 706 et seq.; R. 76-82) and "II. Conflict With State Laws and Policy" (138 F. Supp. 692-703; R. 50-71).

On January 6, 1958 the "not guilty" pleas entered on behalf of petitioners on June 28, 1955, were withdrawn and a plea of "nolo contendere" was entered on behalf of each and accepted by the Court and thereupon the petitioners were sentenced to fines as follows:

Melrose Distillers, Inc. — \$5,000 on Count One;

CVA Corporation — \$5,000 on Count One and \$1,000 on Count Three;

Dant Distillery and Distributing Corporation — \$5,000 on Count One and \$2,500 on Count Three (R. 89-92). Petitioners appealed to the Court of Appeals for the Fourth Circuit, which affirmed the District Court on the 29th day of August 1958 (App. A.).

Raising a question of "double punishment", if the fines against petitioners are sustained and to be collected from their stockholders, is the fact that their sole stockholder, Schenley Industries, Inc., also pleaded "nolo contendere" to the indictment and was fined \$5,000 on each of Counts One and Three. It did not appeal. Two individual defendants described in the indictment as Vice-Presidents, active in the direction and operation of petitioners, Melrose Distillers, Inc. and CVA Corporation, respectively, were also fined \$2,500 each on their pleas of "nolo contendere". They did not appeal.

It may be pertinent here to note that the government is maintaining a civil action in the District Court based substantially upon the same matters alleged in the indictment. It is true that petitioners (dissolved since May 2, 1955) are not defendants in that civil action, but Schenley Industries, Inc., who was their sole stockholder entitled to their net assets upon their dissolutions, is a party-defendant therein.

The basis for federal jurisdiction in the District Court was an indictment charging violations of Sections 1 and 2 of the Sherman Act (Sections 1 and 2 Title 15, U. S. C. A.).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals conflicts with the decision of two other courts of appeals on the same matter, with respect to the Delaware corporation.

Concerning the first of the "Questions Presented" and with respect to petitioner Dant Distillery and Distributing Corporation, which was a Delaware corporation, the decision of the Court of Appeals is in direct conflict with decisions of the Courts of Appeals in the Tenth and Sixth Circuits, viz.: *United States v. Safeway Stores, Inc.* (1944, C. A. 10) 140 F. (2) 834; *United States v. Line Material Co.* (1953 C. A. 6) 202 F. (2) 929; *United States v. United States Vanadium Corp.* (1956 C. A. 10) 230 F. (2) 646, cert. den. 351 U. S. 939. In those cases it was held that a Delaware corporation could not be criminally prosecuted under the Sherman Anti-Trust Law after its dissolution, whether such dissolution was voluntary (as in the Safeway case) or by merger (as in the Line Material and Vanadium cases) under the laws of Delaware, and whether such dissolution occurred prior to the indictment (as in the Safeway case) or subsequent to the indictment (as in the Line Material and Vanadium cases). The opinion of the Court of Appeals does not show that in 351 U. S. 939 this Court denied certiorari in *United States v. United States Vanadium Corp.* (1956 C. A. 10) 230 F. (2) 646, which case held, contrary to the Court of Appeals in the case at bar, that dissolution of a Delaware corporation after indictment did abate a federal criminal anti-trust prosecution against it. While denial of certiorari is not affirmance, it could mean that

no radical departure from sound law was apparent in the case. The pertinent Delaware statute is set forth in Appendix B.

2. The Court of Appeals has decided an important state question in a way seemingly in conflict with applicable state law or policy.

Concerning the first of the "Questions Presented" and with respect to petitioner Dant Distillery and Distributing Corporation, which was a Delaware corporation, research has not disclosed that Delaware has construed its own statute on the precise point here involved. When, by its highest court, it does so, that construction will bind the federal courts under the rule in *Northern Pacific R. R. Co. v. Meese* (1915) 239 U. S. 614 (619). It is general knowledge, however, that multitudes of corporations all over the country have elected to incorporate and exist under the laws of Delaware, and it is a most logical assumption that Delaware is very much aware of the preponderating interpretation which her corporate dissolution statutes have received in the federal courts of appeal since 1944 (that dissolution of a Delaware corporation abates a criminal prosecution against it) and further, that such interpretation accords with her own policy and intent. Otherwise, it can be assumed, Delaware would have been quick to reverse that interpretation with one of her own.

With respect to petitioners Melrose Distillers, Inc. and CVA Corporation, which were Maryland corporations, the Court of Appeals has construed a Maryland statute in a way which conflicts with the plain language thereof. The pertinent Maryland statutes on dissolved corporations are set forth in Appendix B. The first section 72(b) (now 76(b)) Art. 23 Ann. Code of Maryland 1951 fixes the

purpose for which a Maryland corporation continues after dissolution to-wit:

"... for the purpose of paying, satisfying and discharging any existing debts and obligations. . . ."

The subsequent section (78(a) now 82(a)) id. provides that no such dissolution shall:

"... abate any pending suit or proceeding by or against the corporation . . ."

The later section must be read in *pari materia* with the first and, so read, can only apply to a suit or proceeding on some debt or obligation existing at the time of the dissolution. The Court of Appeals in affirming the District Court has not read these Maryland statutes in *pari materia* and has, by its ruling, necessarily and improperly enlarged and expanded the purpose for which corporate existence is continued after dissolution by sec. 72(b) *supra*, to include a criminal prosecution notwithstanding there is no "existing debt or obligation" in a criminal prosecution, at least until imposition of a monetary fine. In this case, imposition of the fines did not occur until almost three years after these two Maryland corporations had been dissolved, hence these fines could not have been "existing debts or obligations" at the time of dissolution. What has just been said about the meaning of the Maryland statutes on dissolved corporations is strongly supported by the circumstance that by sec. 11 of chapter 399 of the Acts of the General Assembly of Maryland for 1957, section 78(a) (now 82(a)) of Article 23 of the Ann. Code of Maryland was amended to delete the language:

"Nor shall such dissolution abate any pending suit or proceeding by or against the corporation. . ."

which was then re-enacted by the same legislature (as Rule 222 Maryland Rules of Procedure for the Court of

Appeals and Judicial Circuits of Maryland) using only the term "action", as follows:

"An *action* by or against a corporation shall not abate by reason of the dissolution, forfeiture of charter, merger, or consolidation of such corporation. Such *action* may be continued with such change of parties as the court may direct."

This subsequent change of the term "suit or proceeding" to "action" is significant that the former term "suit or proceeding" was never intended to be wider than "action" which in customary parlance does not include a criminal prosecution. This is borne out by the fact that Rule 222 applies only to Civil actions, since the Rules pertaining to Criminal prosecutions commence at Rule 701.

3. The Court of Appeals has decided that criminal prosecution of a private corporation survives its dissolution, contrary to applicable decisions of this Court.

With respect to the first of the "Questions Presented" the decision of the Court of Appeals conflicts with applicable decisions of this Court. In *Oklahoma Natural Gas Co. v. Oklahoma* (1927) 273 U. S. 257 (259) this Court, speaking necessarily with reference to *legal* affairs, liabilities and properties, said that in the federal jurisdiction the result of a corporate dissolution cannot be distinguished from the death of a natural person in its effect. This "equation" was repeated with approval in *Chicago Title and Trust Co. v. Wilcox Bldg. Corp.* (1937) 302 U. S. 120 (125). The analogy is at once accurate and complete. On the death of a natural person his assets, subject to payment of his debts, are equitably owned by his heirs or legatees. On the dissolution of a corporation, its assets, subject to payment of its debts, are equitably owned by its stockholders. In addition to distribution of the remain-

ing assets, the end to be attained in each case is "discharge of debts or obligations existing at the death of the natural person or the dissolution of the corporation." The term "existing" is emphasized because there can be none other since a deceased natural person cannot incur a "new" debt or obligation and neither can a dissolved corporation except, conceivably, for winding-up purposes — a situation not here suggested or involved. To continue the analogy, this end is attained by probate proceedings following death of the natural person and by statutes continuing corporate existence following dissolution in the case of a corporation. By failing to credit this analogy, the Court of Appeals has concluded that a dissolved corporation continues to exist not only for the purpose of discharging its existing debts and obligations but for the purpose of criminal prosecution and subsequently imposed criminal fines. Furthermore, if the analogy referred to is to be respected, it is submitted that the decision below runs counter to the rule announced in *Schreiber v. Sharpless* (1883) 110 U. S. 76 (80):

"At common law actions on penal statutes do not survive, and there is no act of Congress which establishes any other rule in respect to actions on the penal statutes of the United States. Whether an action survives depends on the substance of the cause of action, not on the forms of proceedings to enforce it. As the nature of penalties and forfeitures imposed by acts of Congress cannot be changed by state laws, it follows that state statutes allowing suits on state penal statutes to be prosecuted after the death of the offender, can have no effect on suits in the courts of the United States for the recovery of penalties imposed by an act of Congress."

4. The decision of the Court of Appeals Obliterates the Essential Difference in Nature between a Civil or Remedial Action and a Criminal Prosecution.

This point also pertains to the first of the "Questions Presented". The aim of the civil or remedial action is compensatory; the aim of the criminal prosecution is punitive. In the first the issue is "liability" and the recovery is compensatory, indicative of some underlying or pre-existing obligation and as a remedy for it. In the second, the issue is "guilt or innocence" of a public offense and if a fine is imposed upon an adjudication of guilt, it is not compensation in any sense but is purely punishment — a forfeiture or exaction and not indicative of any underlying or pre-existing obligation of the defendant to anyone, and bearing no relation whatever to any damage suffered by anyone at the hands of the defendant. Indeed, there may be an adjudication of guilt with no fine at all imposed. Hence it is clear that a criminal fine has and can have no existence prior to the moment it is lawfully imposed. This ineradicable distinction in nature between the two is highlighted in every day law by the fact that the same person may be criminally prosecuted and fined for a criminal act with no effect whatever upon his civil or remedial liability to any person injured by the same act. Thus the criminal can escape the punishment by dying (only particeps criminis can be punished) and whether he dies by his own hand is immaterial; but his estate cannot escape remedial liability for damage occasioned another by his criminal act. In affirming the District Court in the imposition of criminal fines on petitioners almost three years after their dissolutions, the Court of Appeals has ignored this fundamental distinction in a way that will create doubt and confusion in this area of the law, calling for correction by this Court.

5. The Indictment was Insufficient as to Petitioners

With respect to the second of the "Questions Presented" it is submitted that at all times pertinent Maryland had a comprehensive Alcoholic Beverage Law. The pertinent parts thereof are in Appendix B, pp. 26-27. In *Dundalk Liquor Co. v. Tawes* (1951) 197 Md. 446, 79 A. (2) 525 (528-529) the Court of Appeals of Maryland held that a then existing Regulation 206 under the Alcoholic Beverages Law of that state permitted a horizontal price fix by the state comptroller in alcoholic beverages which was unauthorized by the underlying statute itself. Thereupon the state legislature added sections 1 and 105 (now 109) to Article 2B Ann. Code of Maryland 1951 (Appendix B, pp. 26, 29) expressly authorizing the type of regulation which the Court had ruled out. In the later case of *Dundalk Liquor Co. v. Tawes* (1952) 201 Md. 58, 92 A. (2) 560 (562), the same Court held in substance that such legislation was within the competence of the State of Maryland under the Twenty-first Amendment even though it assumed that, without the power of the Amendment, it might involve violation of the Sherman Act. It is further submitted that the acts charged in the indictment as violations of sections 1 and 2 of the Sherman Act were compatible with the Alcoholic Beverages Law of Maryland therefore not indictable offenses under the Sherman Act under the rule expressed in *Washington Brewers Institute v. United States* (1943) 137 F. (2) 964 (968) cert. den. 320 U. S. 776:

"By the terms of its fundamental law the national government has disabled itself from prosecuting as an offense that which a state has commanded or implicitly encouraged as a means of controlling the traffic in intoxicants within its borders."

and in *United States v. Frankfort Distilleries, Inc.* (1945) 324 U. S. 293 and especially in the separate concurring opinion of Mr. Justice Frankfurter (301):

"If an agreement among local dealers . . . does not offend the Sherman Law, though a like agreement as to other commodities (than liquor) would, an agreement among liquor dealers to abide by state policy for a uniform price . . . can hardly be a violation of the Sherman Law. . . ."

and (302):

"For in any event, if state policy did so authorize it, conformity with the state policy could not be decreed an unreasonable restraint of interstate commerce."

It would appear that in this respect the Court of Appeals has decided a federal question in a way in conflict with an applicable decision of this Court in view of the Maryland Alcoholic Beverages Law.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT S. MARX,

ROY G. HOLMES,

900 Tri-State Building,
Cincinnati 2, Ohio,

HILARY W. GANS,

1904 First National Bank
Building,
Baltimore 2, Maryland,

Counsel for Petitioners.

Of Counsel:

NICHOLS, WOOD, MARX & GINTER,

900 Tri-State Building,
Cincinnati 2, Ohio,

MARKELL, VEAZEY & GANS,

1904 First National Bank Building,
Baltimore 2, Maryland.

APPENDIX A:

OPINION AND JUDGMENT OF THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

(Note) In accord with Rule 23(1)(i) of the Supreme Court, the opinion of the District Court, reported in 138 F. Supp. 685 et seq., is omitted. It appears on pages 43-82 of the record as printed for use of the Court of Appeals, nine copies of which are filed with this petition.

UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

No. 7608

Melrose Distillers, Inc., CVA Corporation, and Dant
Distillery and Distributing Corporation,
Appellants,

versus

United States of America,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND, AT BALTIMORE

(Argued June 4, 1958.)

Decided August 29, 1958.)

Before Soper and Haynsworth, Circuit Judges, and Moore,
District Judge.

Robert S. Marx (Roy G. Holmes; Hilary W. Gans; Markell,
Veazey & Gans, and Nichols, Wood, Marx & Ginter on
brief) for Appellants, and Wilford L. Whitley, Jr., At-

torney, Department of Justice, (Victor R. Hansen, Assistant Attorney General; George H. Schueller, Attorney, Department of Justice, and Leon H. A. Pierson, United States Attorney, on brief) for Appellee.

MOORE, District Judge:

Appellants Melrose Distillers, Inc. and CVA Corporation are dissolved Maryland corporations. Appellant Dant Distillery and Distributing Corporation is a dissolved Delaware corporation. They were convicted along with numerous other defendants not involved here on their plea of nolo contendere to a three count indictment charging conspiracy to fix wholesale and retail prices of alcoholic beverages shipped into the State of Maryland by outside manufacturers, and to monopolize and attempt to monopolize interstate trade and commerce therein in violation of Sections 1 and 2 of the Sherman Act. The indictment was returned on April 6, 1955. The corporations were all dissolved on May 2, 1955. The plea of nolo contendere was filed on January 6, 1958. Prior to their plea of nolo contendere, appellants had pleaded not guilty and had moved to dismiss the indictment on the grounds, so far as pertinent here, (1) that each of them had been dissolved prior to the plea of nolo contendere, and (2) that the alleged acts and conduct of defendants charged in the indictment "were permitted, sanctioned, and encouraged" by the announced governmental policy and law of the State of Maryland.

The questions involved in appellants' motions in the District Court to dismiss the indictment survive the plea of nolo contendere, *Universal Milk Bottle Service v. United States*, 6 Cir., 188 F. 2d 959. Hence, appellants would be entitled to a reversal of their conviction notwithstanding the plea of nolo contendere should their contentions regarding the indictment be sustained on this appeal.

The law of Delaware providing for the survival for certain purposes of dissolved corporations (Section 278 of the

General Corporation Law of the State of Delaware, (8) Del. C. §278) reads as follows:

"All Corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such actions, suits or proceedings, so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed."

Corresponding provisions of the law of Maryland are:

"The dissolution of the corporation shall be effective when the articles of dissolution have been accepted for record by the Commission, provided, however, that the corporation shall continue in existence for the purpose of paying, satisfying and discharging any existing debts and obligations, collecting and distributing its assets, and doing all other acts required to liquidate and wind up its business and affairs." Section 72(b) Article 23 of the Annotated Code of Maryland (1951) (now Section 76(b)) and

"The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed upon them by law; nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be

continued with such substitution of parties, if any, as the court directs . . ." Section 78(a) *iden*.

Appellants argue that both the Delaware and the Maryland statutes should be interpreted to mean that a dissolved corporation survives its dissolution only for the purpose of winding up its civil affairs and discharging its civil obligations; but that no criminal charges which have not been disposed of by imposition of a fine or penalty survive the dissolution of the corporations. Stated more clearly, the argument is that insofar as pending criminal proceedings are concerned, the dissolution of a corporation is equivalent to the death of a natural person and that unless the legislature of the state of the corporation's birth shall have specifically provided otherwise (as they contend neither Delaware nor Maryland has done) a pending criminal proceeding can go no farther. We think this contention is based upon a strained and artificial interpretation of the statutory language. There may be situations in which a precise and restrictive meaning should be given to the words "action, suit or proceeding" as used in the Delaware statute and the words "suit or proceeding" as used in the Maryland statute. However, the application of these words where the question involves the abatement or survival of criminal prosecutions pending against corporations does not present such a situation. To give them the constructions for which appellants contend would offend our sense of justice, pervert the obvious policy of the state in enacting these survival statutes, and provide an easy avenue of escape by corporations from the consequence of their criminal acts by the simple process of voluntary dissolution.

That there is a division of authority on this question can not be denied. The Tenth Circuit in the case of *United States v. Safeway Stores, Inc.*, 10 Cir., 140 F. 2d 834, in considering the same Delaware statute involved here, concluded that the word "suits" does not include a criminal prosecution. It is to be noted, however, that the Court in that case did not even consider, much less interpret, the broader term "proceedings", appearing in the same statute. Moreover, the corporations involved there had been dis-

solved prior to indictment, and therefore there was no "pending" proceeding.

In the later case of *United States v. United States Vanadium Corporation*, 10 Cir., 230 F. 2d 646, decided by a different panel of judges of the Tenth Circuit, that Court, while adhering to the doctrine of the *Safeway* case, said that the panel of judges who decided the *Vanadium* case were not "in full sympathy with the law as declared in the *Safeway* case", and strongly intimated that were it not for their feeling "that one panel of the Court should not lightly overrule a decision by another panel" they would have arrived at a different conclusion.

In *United States v. Line Material Company*, 6 Cir., 202 F. 2d 929, the Court of Appeals for the Sixth Circuit, construing this same Delaware statute, held that the words "action, suit or proceeding" did not embrace a criminal prosecution.

On the other hand, the Court of Appeals for the Seventh Circuit, in the case of *United States v. P. F. Collier & Son Corporation*, 7 Cir., 208 F. 2d 936, reached exactly the opposite conclusion. The reasoning of that Court was as follows:

"We have read and reread defendants' argument, as well as the many cases cited in support of the order appealed from, but we are unable to escape what we think is the plain, unambiguous terminology contained in the Delaware statute. The words 'any action, suit, or proceeding' in their ordinary and generally accepted meaning and use embrace, so we think, all forms of litigation, civil, criminal, bankruptcy and admiralty. The words carry such a plain meaning that they are hardly open to construction, and their employment leaves no room to speculate on the legislative intent. If, however, the legislature had intended to embrace only civil litigation, it could easily have done so by the addition of a single word, 'civil' and could have provided for 'any civil action, suit or proceeding.' Or if it had intended to exclude a criminal prosecution

from the broad and inclusive language which it employed, it could readily have done so by providing, 'any action, suit or proceeding other than a criminal prosecution.' And while it may be an immaterial observation, no sound reason occurs why a legislature would intend to relieve a dissolved corporation of its criminal liability, and at the same time preserve its civil liability. A corporation cannot be sent to jail; the discharge of its liability whether criminal or civil can only be effected by the payment of money."

In our view the *Collier* case correctly interprets and applies the words of the Delaware statute. We have held in a tax case, construing the very Delaware statute involved here that "(T)he word 'proceeding' is obviously broader than action or suit and should be given full effect in order to achieve the fundamental purpose of the statute." *Bahen & Wright, Inc. v. Commissioner of Internal Revenue*, 4 Cir., 176 F. 2d 538. See also *United States v. Maryland and Virginia Milk Producers, Inc.*, 145 F. Supp. 374 (D. C. Dist. Col.).

We find the Maryland statute to be, in all its essentials, of like effect to that of Delaware. We conclude therefore that under the applicable statutes, both of Delaware and Maryland, the dissolution of appellant corporations did not extinguish their liability in pending criminal proceedings against them.

Appellants' motions in the District Court to dismiss Counts 1 and 2 of the indictment on the ground that the alleged acts and conduct of defendants charged therein "were permitted, sanctioned, and encouraged" by the announced governmental policy and law of the State of Maryland was without merit, and was properly overruled.

Two Maryland statutes were cited in support of this motion. One was the Maryland Alcoholic Beverages Law; the other the Maryland Fair Trade Law. The pertinent portions of the Alcoholic Beverages Law merely provide against discrimination by manufacturers and wholesalers in price, discounts, or quality of merchandise between one

customer and another; and further that the Comptroller of the Treasury shall prescribe maximum discounts and require manufacturers and wholesalers to file a schedule of their prices to their customers, and to file with the Comptroller any proposed price change, which change, if a reduction in price, is to be postponed for a period of time prescribed by the Comptroller sufficient to permit notice to other manufacturers or wholesalers selling similar wines or liquors and an opportunity for them to make a like price decrease. Obviously, this system of regulation preserves free and open competition among retailers, and could not by any stretch of the imagination be denominated "horizontal" price fixing.

The Fair Trade Law of Maryland, as do most such State Fair Trade laws, merely permits manufacturers and wholesalers of trade-marked goods which are in free and open competition with other goods of the same class to fix the retail price of these goods for the purpose of protecting the trade mark. Neither the Maryland Fair Trade Law nor the Maryland Alcoholic Beverages Law affords protection against prosecution for a conspiracy to fix prices "horizontally" or a conspiracy to monopolize trade or an attempt to do so.

The indictment in count one charged a conspiracy to bring about "horizontal" price fixing; in count two it charged a conspiracy to monopolize interstate trade and commerce in alcoholic beverages, and in count three it charged an attempt to monopolize such trade and commerce. None of these acts is in any way permitted, sanctioned, or encouraged by the announced governmental policy and law of the State of Maryland.

It follows from what has been said that the judgment of the District Court is

Affirmed.

JUDGMENT

Filed and Entered August 29, 1958.

UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

No. 7608

Melrose Distillers, Inc., CVA Corporation, and Dant
Distillery and Distributing Corporation,
Appellants,

vs.

United States of America,

Appellee.

APPEALS FROM the United States District Court for the
District of Maryland.

THIS CAUSE came on to be heard on the record from the
United States District Court for the District of Maryland,
and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and
adjudged by this Court that the judgments of the said Dis-
trict Court appealed from, in this cause, be, and the same
are hereby, affirmed.

MORRIS A. SOPER,
United States Circuit Judge.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge

BEN MOORE,
United States District Judge.

APPENDIX B.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

THE TWENTY FIRST AMENDMENT

Section 2 of The Twenty First Amendment to the Constitution of the United States (adopted December 5, 1933) provides:

"The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

THE SHERMAN ANTI-TRUST LAW

Section 1 of the Sherman Act (Section 1, Title 15 USCA) as it stood when this indictment was returned, provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: *Provided*, that nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided Further*, that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment

or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

Section 2 of the Sherman Act (Section 2 Title 15 USCA) as it stood when the indictment was returned, provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

AUTHORITY FOR REVIEW BY CERTIORARI

Section 1254(1) Title 28 USCA provides:

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) * * *:

DELAWARE CORPORATION LAW

Section 278 Delaware General Corporation Law (Section 78, Title 8, Chapter 1, Delaware Code of 1953) in its pertinent parts:

"All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such actions, suits or proceedings so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgment, orders, or decrees therein shall be fully executed."

MARYLAND CORPORATION LAW

Section 72(b) (now 76(b)) Article 23, Annotated Code of Maryland, 1951:

"The dissolution of the corporation shall be effective when the articles of dissolution have been accepted for record by the Commission, provided, however, that the corporation shall continue in existence for the purpose of paying, satisfying and discharging any existing debts and obligations, collecting and distributing its assets, and doing all other acts required to liquidate and wind up its business and affairs."

Section 74 (now 78) Article 23, Annotated Code of Maryland 1951:

"(a) Upon dissolution of any corporation of this State, and unless and until one or more receivers of the property and assets of the corporation have been appointed by a court of competent jurisdiction, the directors shall become and be, for purposes of liquidation, trustees of the property and assets of the corporation so dissolved.

(b) * * *. They shall proceed to collect and distribute the assets of the corporation, applying such assets to the extent available to the payment, satisfaction and discharge of existing debts and obligations of the corporation, including necessary expenses of liquidation, and distributing the remaining assets among the stockholders. * * *."

Section 78(a) (now 82(a)) Article 23 Annotated Code of Maryland 1951:

"The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed on them by law; nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be continued with such substitution of parties, if any, as the court directs. * * *"

MARYLAND LIQUOR LAW

Section 1 Article 2B, Annotated Code of Maryland 1951 (added in 1951):

"It is hereby declared as the policy of the State that it is necessary to regulate and control the manufacture, sale, distribution, transportation and storage of alcoholic beverages within this State and the transportation and distribution of alcoholic beverages into and out of this State to obtain respect and obedience to law and to foster and promote temperance. It is hereby declared to be the legislative intent that such policy

will be carried out in the best public interest by empowering the Comptroller of the Treasury, the State Appeal Board, the various local Boards of License Commissioners and Liquor Control Boards, all enforcement officers and the Judges and Clerks of the various Courts of this State with sufficient authority to administer and enforce the provisions of this Article. The restrictions, regulations, provisions and penalties contained in this Article are for the protection, health, welfare and safety of the people of this State. It shall also be the policy of the State to tax alcoholic beverages as provided in this Article: * * *"

Section 105 (now 109) Article 2B, Annotated Code of Maryland 1951 (added in 1951):

"(a) It is the declared policy of this State that it is necessary to regulate and control the sale and distribution within the State of wines and liquors, for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars, which unduly stimulate the sale and consumption of wines and liquors and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of wines and liquors should be subjected to the following restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination."

"(b) The Comptroller, is authorized and directed, by regulations, to prescribe the maximum discounts which may be allowed by any manufacturer or wholesaler in the sale and distribution of various quantities of wines and liquors. Said regulation may also, in the discretion of the Comptroller, prohibit the giving of discounts by any manufacturer or wholesaler in the sale and distribution of any or all quantities or kinds of wines and liquors."

"(c) The Comptroller is authorized and directed, by regulation, to require the filing, from time to time, by any manufacturer or wholesaler or non-resident dealer, of schedules of prices at which wines and liquors are sold by such manufacturer or wholesaler or non-resident dealer, and further to require the filing of any proposed price change. Said regulation shall provide that the effective date of any proposed price decrease shall be postponed for such period of time as the Comptroller may prescribe sufficient to permit notice thereof to other manufacturers or wholesalers selling similar wines and liquors and an opportunity for the same to make a like price decrease. Said regulation shall also provide that any manufacturer or wholesaler or non-resident dealer proposing to sell any wines and liquors not currently being sold by the same shall first give notice to the Comptroller of the prices at which such wines and liquors are proposed to be sold; and said regulation shall further provide that sales of such wines and liquors shall not be made for such period of time as the Comptroller may prescribe sufficient to permit notice thereof to other manufacturers or wholesalers selling similar wines and liquors and an opportunity for such other manufacturers or wholesalers to alter the price of such similar wines and liquors so as to make that price comparable to the price fixed by the manufacturer or wholesaler proposing to sell wines and liquors not currently being sold. The Comptroller is authorized and empowered, in promulgating the regulations required by this subsection, to require the filing by any manufacturer or wholesaler or non-resident dealer of any other information with regard to the size, containers, brands, labels, descriptions, packages, quantities to be sold and any other data in connection with wines and liquors as the Comptroller may reasonably determine."

"(d) Any person violating any of the provisions of any regulation promulgated under the authority contained in this section shall be subject to the penalties

provided in Sections 4 and 66, as the case may be, of this Article."

"(e) Nothing contained in this section shall be construed to authorize the Comptroller to fix the prices at which any wines and liquors may be sold by any manufacturer or wholesaler or non-resident dealer other than to fix permissible discounts which may be allowed by any manufacturer or wholesaler on such sales and other than to postpone the effective date of any proposed price decrease in the sale and distribution of wines and liquors currently sold by any manufacturer or wholesaler or non-resident dealer or the effective date of the sale of any wines and liquors not currently being sold by any manufacturer or wholesaler or non-resident dealer for a reasonable period sufficient to permit the filing of proposed price decreases or proposed sales of wines and liquors not currently being sold, as the case may be, with the Comptroller and notice thereof to other manufacturers or wholesalers, and an opportunity for the same to make like price changes. Nothing contained in this section shall be construed to require any manufacturer or wholesaler or non-resident dealer of wines and liquors to make sales to any licensees under the provisions of this Article."